SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 185

PENNSYLVANIA-READING SEASHORE LINES,
Petitioner,

vs.

HILDEGARDE CAWMAN, ADMINISTRATRIX OF THE ESTATE OF JOHN W. CAWMAN, DECEASED,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

There was no opinion by the District Judge, although his reasons for directing a verdict are set forth in the record on page 189 *et seq.*

The opinion of the Circuit Court of Appeals (R. 211) is reported in 110 F. (2d) 832.

II.

Jurisdiction.

1. The statutory provision believed to sustain the jurisdiction of this Court is Judical Code, Sec. 240 (a) as amended by the act of Feb. 13, 1925, 43 Stat. 938 (U. S. Code, Title 28, Sec. 347 (a)).

2. The order of the Circuit Court of Appeals, review of which is sought, was entered on March 27, 1940 (R. 215).

Although the order of the Circuit Court of Appeals is not a final judgment, Sec. 240 (a) of the Judicial Code, as amended, clearly confers discretionary jurisdiction upon this Court to bring up a case of this character from a Circuit Court of Appeals by certiorari and sub-paragraph (b) of Paragraph 5 of Rule 38 of this Court clearly recognizes such right. Certiorari was allowed by this Court after a judgment was reversed and a new trial ordered in the Circuit Court of Appeals in the cases of *The Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U. S. 333, and *Dilk* v. *St. Louis & San. Fran. R. R. Co.*, 220 U. S. 580. Other cases believed to sustain the jurisdiction of this Court are cited in the accompanying petition.

III.

Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for certiorari and, in the interest of brevity, are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows.

IV.

Specification of Errors.

It is respectfully submitted that the Circuit Court of Appeals erred:

1. In holding that the judgment of the District Court entered on the directed verdict for the defendant should be reversed, such reversal being in conflict with the applicable decisions of this Court;

2. In that while recognizing the statutory test of liability under the Federal Employers' Liability Act, it has construed the act as though it were one providing for liability without fault in conflict with the applicable decisions of this Court.

Summary of Argument.

The points of the argument follow the reasons relied upon for the allowance of the writ. We will confine ourselves to these reasons.

ARGUMENT.

(Italics and boldface type ours unless otherwise noted.)

I.

The Circuit Court of Appeals, in reversing the judgment of the District Court in favor of petitioner, decided a Federal question in conflict with the applicable decisions of this Court.

A. Baltimore & Ohio Railroad Co. v. Berry, 286 U. S. 272.

It is almost unique to find two cases whose factual backgrounds are so nearly identical. In the instant case, as in the *Berry* case, in which the opinion of this Court was written by Mr. Justice Stone, the injured party was an experienced railway brakeman. In both cases we have a brakeman leaving his caboose while it was standing on a trestle in the night time and apparently stepping off into space as a result of which injuries were sustained. In the *Berry* case the brakeman leaves the caboose on orders from the conductor while in the instant case he is complying with a rule of the road to protect the rear end of the train.

In neither case was the outer edge of the bridge or trestle protected by a light, guard rail or catwalk although, in the instant case, had Cawman descended from the caboose between the tracks he would have found a walkway.

This Court, in its opinion in the cited case, referring to the Missouri Supreme Court (286 U. S. 272, 274) said:

> "It held rightly that there was no evidence that the petitioner was negligent in stopping the train where it did but as it concluded that the petitioner negligently directed or permitted respondent to alight at that point, it upheld the verdict as necessarily involving a finding of such negligence on the part of the conductor."

In reversing the court below upon the ground that it was error to permit the case to go to a jury, we find this Court observing (page 274):

> "There was no evidence that either the conductor or respondent knew that the caboose had stopped on the trestle and, as they were together in the cupola of the caboose when the train stopped, their opportunity for knowledge, as each knew, was the same. Hence, there is no room for inference that the conductor was under a duty to warn of danger known to him and not to the respondent, or that respondent relied or had reason to rely on the conductor to give such warning. Nor was the request to alight a command to do so regardless of any danger reasonably discoverable by respondent. *The conductor did not ask respondent to alight from the caboose rather than from one of the forward cars standing clear of the trestle, where it was safe, or to omit the precautions which a reasonable man would take to ascertain, by inspection, whether he could safely alight at the point chosen.* There was no evidence that the respondent could not have discovered the danger by use of his lantern or by other reasonable precautions, or that he in fact made any effort to ascertain whether the place was one where he could safely alight."

And again on page 275, we find this Court, in its opinion, repeating:

> "There was no breach of duty on the part of the conductor in asking the respondent, in the performance of his duty, to alight or in failing to inspect the place

where he alighted or to warn him of the danger. *If negligence caused the injury, it was exclusively that of the respondent.* Proof of negligence by the railroad was prerequisite to recovery under the Federal Employers' Liability Act."

The Circuit Court of Appeals, in its opinion (R. 214), while conceding that, under the authority of the *Berry* case, the stopping of the train so that the caboose was on a trestle, the outer edge of which provided no room for alighting and from which the brakeman attempted to alight either pursuant to order given by the conductor, as in the *Berry* case, or under the rules, as in the instant case, offered no evidence of negligence, nevertheless reversed on the following grounds:

"The trestle from which the plaintiff's intestate fell was that and nothing more. There was no light, guard rail, or catwalk for the protection of those whose duties might require their physical presence on the non-existent flooring. We think this omission may constitute a breach of the conceded obligation to provide a safe place to work" (R. 214).

* * * * * * *

"The failure or compliance in this aspect was not presented to the United States Supreme Court in Baltimore & O. R. Co. *v.* Berry, 286 U. S. 272. We believe it properly for the consideration of a jury and not of a court" (R. 215).

The record in the *Berry* case and the opinion of this Court, clearly demonstrate that this Court had before it for consideration, the physical condition of the trestle in question which was "so narrow as to afford no foothold to one getting off the train at that point".

In both cases the question of negligence necessarily turned upon the character of the place where the brakeman was directed to alight. In the *Berry* case neither side of the

trestle provided the brakeman with a safe place to alight. In the instant case, a safe walkway was provided between the tracks and it would seem that under these circumstances the matter is a *fortiori* in the case at bar. The Circuit Court of Appeals below has attempted to create a distinction without a difference. The decision of the Circuit Court creates uncertainty and confusion in the application of the Federal law. While the opinion below indicates a perhaps justifiable dissatisfaction with the present act, the correction of this unfortunate state of affairs must necessarily be left to the legislature. In the meantime, it is the duty of the Circuit Court of Appeals to follow the decisions of this Court.

B. UNDER THE APPLICABLE DECISIONS OF THIS COURT, PETITIONER WAS NOT REQUIRED TO CONSTRUCT OR MAINTAIN ITS BRIDGE ACCORDING TO ANY PARTICULAR STANDARD.

The Circuit Court of Appeals, in suggesting that the failure of the petitioner to have a "light, guard rail or catwalk" was apparently, in every instance, "properly for the consideration of a jury and not of the court" (R. 215), is clearly in conflict with the applicable decisions of this Court on this question.

In the case of *Delaware, Lackawanna & Western R. R. Co.* v. *Koske*, 279 U. S. 7, 11, in which this Court reversed the trial court for its failure to direct a verdict, there was a somewhat analogous set of facts. Plaintiff sued under the Federal Employers' Liability Act in the New Jersey State Court for damages for injuries sustained by him when, at four o'clock of a June morning, on alighting from an engine in the course of his employment, he stepped into a ditch and was injured. Defendant moved for a directed verdict on the ground that there was no evidence of negli-

gence and that it conclusively appeared that complainant assumed the risk of accident and injuries complained of. The opinion states, at page 11:

> "Fault or negligence may not be found from the mere existence of the drain and the happening of the accident. The measure of duty owed by defendant to plaintiff was reasonable or ordinary care, having regard to the circumstances. Patton *v.* Texas & P. R. R. Co., 107 U. S. 658, 664; 45 Law Ed. 361, 364; 21 Sup. Ct. Rep. 275. There is no evidence that the open drain was not suitable or appropriate for the purpose for which it was maintained or that there was in use by defendant or other carriers any means for the drainage of railroad yards which involved less of danger to switchmen and others employed therein. *Defendant was not bound to maintain its yard in the best or safest condition; it had much freedom in the selection of methods to drain its yard and in the choice of facilities and places for the use of its employees. Courts will not prescribe standards in respect of such matters or leave engineering questions such as are involved in the construction and maintenance of railroad yards and the drainage systems therein to the uncertain and varied judgment of juries.* Toledo, St. L. and W. R. Co. *v.* Allen, 276 U. S. 165, 170; 72 L. ed. 513, 516; 48 Sup. Ct. Rep. 215."

In the case of *Toledo, St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, the plaintiff brought suit under the Act in the courts of Missouri for injuries sustained by him while checking cars in a railroad yard as a result of being crushed between two cars on different tracks where the evidence disclosed these tracks were only two feet nine inches apart without considering grab irons which projected further into this space. Cars were being shifted without lights at the time. The trial court permitted the case to go to the jury. This Court, in its opinion reversing the lower court and

holding that it was error to have submitted the question to the jury, stated (page 170):

> "*The rule of law* which holds the employer to ordinary care to provide his employees a reasonably safe place in which to work *did not impose upon defendant an obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards.* Baltimore & O. R. Co. *v.* Groeger, 266 U. S. 521, 529, 69 L. Ed. 419, 424, 45 Sup. Ct. Rep. 169. Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries. Tuttle *v.* Detroit, G. H. & M. R. Co., 122 U. S. 189, 194, 30 L. Ed. 1114, 1116, 7 Sup. Ct. Rep. 1166; Randall *v.* Baltimore & O. R. Co., 109 U. S. 478, 482, 27 L. Ed. 1003, 1005, 3 Sup. Ct. Rep. 322; Washington & G. R. Co. *v.* McDade, 135 U. S. 554, 570, 34 L. Ed. 235, 241, 10 Sup. Ct. Rep. 1044."

Likewise, in the case of *Missouri P. R. Co.* v. *Aeby*, 275 U. S. 426, 430, 72 L. Ed. 351, 354, this Court, in commenting on a construction of a railroad platform containing a depression into which an employee had stepped and fallen, said:

> "The petitioner (railroad) was not required to have any particular type or kind of platform or to maintain it in the safest and best possible condition. Baltimore & O. R. Co. *v.* Groeger, 266 U. S. 521, 529, 69 L. Ed. 419, 424."

It is perfectly apparent from a study of the opinions rendered by this Court over a wide period of time, that it is now well established that our highest court will not limit either the freedom of choice which the railroad has in the construction of its bridges nor permit a jury question to be raised as to the standard of such construction.

Delaware, L. & W. R. Co. v. *Koske, supra.*

The broad language used by the Circuit Court of Appeals below is in clear conflict with the decisions previously cited.

C. Respondent's intestate voluntarily assumed the risk of his employment, including the risk which allegedly resulted in his death.

The Circuit Court of Appeals, in reversing the judgment entered by the District Court on a direction of verdict in favor of the petitioner, entirely ignored, in its opinion, petitioner's defense of assumption of risk.

Except as specified in the Federal Employers' Liability Act, an employee assumes the risks of his employment and when obvious or fully known and appreciated by him, the extraordinary ones and those due to the negligence of his employer and fellow employees.

Toledo, St. L. & W. R. Co. v. *Allen*, 276 U. S. 160;
Seaboard Airline R. Co. v. *Horton*, 233 U. S. 492, 502;
Missouri & Pacific R. Co. v. *Aeby*, 275 U. S. 426, 430;
Delaware, L. & W. R. Co. v. *Koske*, 279 U. S. 7, 11;
Patton v. *Texas & Pacific Rwy. Co.*, 179 U. S. 658, 663.

This question was also present in the case of *Baltimore & Ohio R. Co.* v. *Berry, supra*, where this court reversed the lower court and held it was error to have permitted the case to go to the jury.

In the instant case it cannot be said that the danger which confronted Cawman as he performed his duty on the night in question was anything other than a normal incident to his employment. The undisputed testimony was to the effect that he was an experienced railroad man; that he had been over this run as far back as 1917 and that since 1932 or 1933 he had been going over it on two occasions daily. He, therefore, was or should have been thoroughly familiar with the fact that there were a number of bridges in this locality and that this particular bridge was in the

immediate locality where this train was frequently forced to stop because of the signal. Under these circumstances, if this was an extraordinary risk, then he assumed it together with those risks due to negligence of his employer and fellow employees.

Seaboard Airline R. Co. v. *Horton*, 233 U. S. 492, 501.
Jacobs v. *Southern Railway Co.*, 241 U. S. 229.

In addition, it must be remembered that he had with him the necessary lights as he left the caboose. As this Court said in the case of *Baltimore & O. R. Co.* v. *Berry, supra* (page 275):

> "The conductor could have no knowledge of such danger, nor was he in a position to gain knowledge, superior to that of other trainmen, *whose duty it was to use reasonable care to ascertain, each for himself, whether, in doing his work, he was exposing himself to peril.*"

Nothing appears in the case to suggest that the bridge in question was in anywise contrary to good railroad practice.

Sec. 4 of the Federal Employers' Liability Act, provides:

> "Such employe shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute, enacted for the safety of employes, contributed to the injury or death of such employe."

This Court has held that in so eliminating the defense of assumption of risk in the cases indicated, Congress plainly evidenced its intent that in all other cases such assumption shall have its former effect as a complete bar to the action.

Seaboard Airline R. Co. v. *Horton*, 233 U. S. 492, 502.

There is no suggestion here that any statute enacted for respondent's safety has been violated.

Delaware, L. & W. R. Co. v. *Koske, supra,* bears striking analogy to the instant case. In that case also, the employe received injuries while alighting from a train. The negligence charged in the *Koske* case was the "permitting an open, uncovered, and unlighted and dangerous hole to exist between certain parts of said tracks." This Court held (page 12), that the plaintiff had assumed the risk.

D. THERE WAS NO EVIDENCE OF NEGLIGENCE ON THE PART OF THE PETITIONER.

The Circuit Court of Appeals, in reversing the judgment of the District Court in favor of petitioner and remanding the case for a new trial, has rendered an opinion in conflict with the decisions of this Court on the question of the quantum of evidence legally required to permit a submission of a case to the jury.

Pennsylvania Railroad Co. v. *Chamberlain,* 288 U. S. 333;
Atchison, T. & S. F. R. Co. v. *Saxon,* 284 U. S. 458;
Gulf M. & N. R. Co. v. *Wells,* 275 U. S. 455, 457.

The authorities are unanimous in their holdings that negligence on the part of the employer may not be inferred under the Employers' Liability Act from the mere existence of danger to the employee or from the fact the plaintiff was injured while in the employment of the railroad.

Toledo, St. L. & W. R. Co. v. *Allen,* 276 U. S. 165, 169;
Missouri P. R. Co. v. *Aeby,* 275 U. S. 426, 430;
Atchison, T. & S. F. R. Co. v. *Saxon,* 284 U. S. 458.

No employment is without its dangers, least of all the type of employment engaged in by the respondent's intestate.

In the instant case, under the holdings of this Court in the *Berry* case, there was no evidence of negligence which would warrant the reversal of the judgment of the District

Court based upon a directed verdict in favor of petitioner.

This Court has held that the stopping of the caboose on the trestle was not, in itself, evidence of negligence. This Court has held that the mere happening of an accident in the course of employment by a railroad is not, in itself, evidence of negligence. This Court has refused to construe the act as imposing any particular standard for railroad construction or to leave such engineering questions to "the uncertain and varying opinion of juries". There was nothing to submit to the jury and hence no warrant for the reversal of the judgment of the District Court.

E. If negligence caused the death of respondent's intestate, it was exclusively that of respondent's intestate.

That was the decision of this Court in the *Berry* case.

It is respectfully submitted that if there is evidence of negligence in this case, it is exclusively that of Cawman.

As Mr. Justice Holmes said, in delivering the opinion of this Court in the case of *Davis* v. *Kennedy,* 266 U. S. 147, 148, 69 L. Ed. 212, 216:

> "It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more. Frese *v.* Chicago, B. & Q. R. Co., 263 U. S. 1, 3, 68 L. Ed. 131, 132, 44 Sup. Ct. Rep. 1."

Cawman was an experienced brakeman. He had his lantern. He had been over the bridge in question many times and was undoubtedly familiar with its width and the dangers involved. He apparently stepped from the caboose without the exercise of any kind of care or caution. Had he taken the precaution which a reasonable man would have taken to ascertain by inspection whether he could safely alight at the point chosen, there would have been

no accident. His negligence was the proximate and sole cause of his injury and thus the judgment of the District Court should have been affirmed and the decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court in this class of case where an experienced employe's injury is caused by his sole negligence.

Atlantic Coast Line R. Co. v. *Driggens*, 279 U. S. 787;
Great Northern Rwy. Co. v. *Wiles*, 240 U. S. 444;
Kansas City S. R. Co. v. *Jones*, 276 U. S. 303.

Conclusion.

From the foregoing it appears that the Circuit Court of Appeals for the Third Circuit has rendered a decision of such a nature as to justify the issuance of a writ of certiorari for its review.

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